

**A                    Malaysia Steel Works (KL) Sdn Bhd v Kamseng  
                         Machine Works Pte Ltd**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-450  
OF 1997

**B                    ABDUL HAMID MOHAMAD, MOHD NOOR AHMAD AND ARIFIN  
                         ZAKARIA JJCA**  
30 SEPTEMBER 2003

*Arbitration — Agreement — Limitation of time — Delay caused by attempts to reach amicable settlement — Delay caused by attitude or conduct of one party — Delay not time barred under ss 6 & 30 of the Limitation Act 1953 — Delay not a bar to legal right of parties — Whether mere lapse of time would prevent the granting of relief*

**C                    *Arbitration — Arbitrator — Appointment — Parties agreed to appointment of arbitrator in the event of disputes — Objection by respondent to the choice of appointed arbitrator after disputes — Application by applicant to High Court for appointment of designated arbitrator or substitute — Whether application properly made — Arbitration Act 1952 s 12***

**D** By an agreement dated 1 December 1988, the applicant contracted to upgrade the respondent's Rolling Mill on site. The agreement provided for arbitration in the event of disputes by an arbitrator. The agreement 'suggested' the name of one GE Kemshall as arbitrator.

**E** The applicant and respondent subsequently had disputes over the agreement. On or about 20 May 1991, the respondent inter alia refused to allow the applicant's servants into their site or allow them discovery of equipment. Attempts for an amicable settlement failed and on 7 March 1993, the applicant wrote to the respondent that GE Kemshall had indicated willingness to arbitrate on the matter. The

**F** respondent replied on 22 April 1993 agreeing to refer the dispute to arbitration but objecting to the appointment of GE Kemshall. On 19 February 1997, the applicant notified the respondent that it wished to refer the matter to arbitration in the terms of the agreement. By a letter of 3 March 1997, the respondent alleged the abandonment of recourse to arbitration on the part of the applicant. The applicant filed

**G** an application seeking to appoint GE Kemshall or some other person as arbitrator to settle the disputes between itself and the respondent. The High Court judge allowed the application and appointed one Khoo Eng Chin as arbitrator. The respondent appealed to the Court of Appeal. On appeal, counsel for the respondent raised the following issues; (i) whether s 12 of the Arbitration Act 1952 was applicable;

**H** (ii) whether there was any abandonment of the arbitration contract by the applicant; and (iii) whether delay on the applicant's part denied it relief under s 12.

**Held**, dismissing the appeal with costs:

**I** (1) On the facts, the applicant's application had been properly made to the High Court. Although GE Kemshall was the arbitrator 'suggested' by the parties, the respondent had objected to his

appointment as arbitrator after the disputes had arisen. Thus the position was that there was no agreement between all the parties as to the appointment of an arbitrator. The applicant's application was for the appointment of the designated arbitrator or his substitute. It could not be made solely for the replacement of the designated arbitrator because he had already indicated his willingness to arbitrate on the matter. It was also premature to apply for the removal of the designated arbitrator because he had not misconducted himself or the proceedings. The applicant had also given the required notice to the respondent and no appointment of an arbitrator had been made by the parties after the lapse of 21 clear days (see p 702D–F).

- (2) There was no merit in the respondent's submission concerning abandonment of the arbitration. From the correspondence between the parties there was no silence or inactivity at all on the part of the applicant on the contract to arbitrate. In the midst of the proposed amicable settlement, the applicant had been quite loud and active on its intention to arbitrate on the disputes but the arbitration machinery could not get off the ground because of some hurdles placed before it by the respondent (see pp 702H–703A).
- (3) There were two other factors to be considered in determining the issue of delay. The first was the existence of the attempt for an amicable settlement which subsequently failed. The second was the attitude or conduct of the respondent on the matter relating to the appointment of an arbitrator. The delay was also not fatal having regard to the provisions of ss 6 and 30 of the Limitation Act 1953. The cause of action accrued on or about 20 May 2001 and the six year limitation period would only creep in on or after 20 May 1997. As the applicant filed its application on 9 April 1997, it was well within time as stipulated under ss 6 and 30 of the Limitation Act 1953. Mere lapse of time will not be a bar to the granting of relief including an equitable relief, unless it would be a bar to the legal right. If the relief is not barred by limitation, the court would have to consider the delay on equitable principles (see p 703D–H).

### [Bahasa Malaysia summary]

Melalui satu perjanjian bertarikh, 1 Disember 1988, pemohon telah membuat perjanjian untuk meningkatkan kilang menggelek responden di tapak. Perjanjian itu memperuntukkan timbangtara jika terdapat pertikaian oleh seorang penimbangtara. Perjanjian itu 'mencadangkan' nama GE Kemshall. Pemohon dan responden kemudian mempunyai pertikaian atas perjanjian itu. Pada 20 Mei 1991, responden, antara lain, tidak membenarkan pekerja-pekerja pemohon di atas tapaknya atau menjalankan penemuan pada pelengkapannya. Percubaan untuk menyelesaikan pertikaian ini gagal dan pada 7 Mac 1993, pemohon telah menulis surat kepada

- A** responden bahawa GE Kemshall telah menunjukkan kesanggupan untuk menimbangtarakan perkara itu. Responden telah menjawab pada 22 April 1997 tetapi membantah perlantikan GE Kemshall. Pada 19 Februari 1997, pemohon telah memberitahu responden bahawa pemohon ingin merujukkan perkara itu kepada timbangtara atas terma-terma perjanjian itu. Melalui surat bertarikh 3 Mac 1997,
- B** responden telah mendakwa peninggalan penggunaan timbangtara oleh pemohon. Pemohon telah memfailkan permohonan untuk melantik GE Kemshall atau orang lain sebagai penimbangtara untuk menyelesaikan pertikaian di antara pemohon dan responden. Mahkamah Tinggi membenarkan permohonan itu dan melantik Khoo Eng Chin sebagai penimbangtara. Responden telah merayu kepada Mahkamah Rayuan. Semasa rayuan, peguam responden membangkitkan isu-isu berikut: (i) sama ada s 12 Akta Timbangtara 1952 terpakai; (ii) sama ada terdapat peninggalan perjanjian timbangtara oleh pemohon; dan (iii) sama ada pemohon tidak dibenarkan mendapat relif di bawah s 12 oleh kerana kelewatan pemohon.
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**Diputuskan**, menolak rayuan dengan kos:

- (1) Pada fakta-fakta, permohonan pemohon ke Mahkamah Tinggi telah dibuat dengan betul. Walaupun GE Kemshall adalah penimbangtara yang ‘dicadangkan’ oleh parti-parti, responden telah membantah kepada perlantikan beliau sebagai penimbangtara selepas pertikaian berlaku. Oleh itu tidak terdapat persetujuan di antara parti-parti mengenai perlantikan penimbangtara. Pemohonan pemohon adalah untuk perlantikan penimbangtara yang telah dilantik atau pengganti beliau. Ia tidak boleh dibuat hanya untuk menggantikan penimbangtara yang telah dilantik kerana beliau telah menunjukkan kesanggupan beliau untuk menimbangtarakan perkara itu. Ia adalah terlalu awal untuk memohon penyingkiran penimbangtara yang telah dilantik sebab beliau tidak melakukan salah laku atau salah uruskan prosiding itu. Pemohon juga telah memberikan notis yang diperlukan kepada responden dan tiada perlantikan penimbangtara telah dibuat oleh parti-parti selepas tempoh 21 hari (lihat ms 702D–F).
- (2) Tidak terdapat merit di dalam penghujahan responden mengenai peninggalan timbangtara. Daripada penyuratan di antara parti-parti tidak terdapat ketidakgiatan pada pihak pemohon atas perjanjian untuk timbangtara. Semasa penyelesaian yang dicadangkan, pemohon telah aktif pada niatnya untuk menimbangtara pertikaian tetapi timbangtara tidak berjaya sebab responden (lihat ms 702H–703A).
- (3) Terdapat dua faktor yang perlu dipertimbangkan di dalam menyelesaikan isu kelewatan. Pertama adalah percubaan penyelesaian yang telah gagal. Kedua adalah sikap dan kelakuan

responden dalam perkara perantaraan penimbangtara. Kelewatan itu tidak membawa padah memandangkan peruntukan-peruntukan ss 6 dan 30 Akta Had Masa 1953. Kausa tindakan itu terakru lebih kurang pada 20 Mei 1997. Memandangkan bahawa pemohon memfailkan permohonan pada 9 April 1997, ia adalah di dalam had masa seperti di dalam ss 6 dan 30 Akta Had Masa 1953. Keluputan had masa tidak boleh menjadi halangan kepada pemberian relif termasuk relif ekuiti, kecuali ia menjadi halangan kepada hak undang-undang. Jika relif tidak dihalang oleh had masa, mahkamah akan mempertimbangkan kelewatan pada prinsip-prinsip ekuiti (lihat ms 703D-H).]

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### Notes

For cases on limitation of time in arbitration agreements, see 1 *Mallal's Digest* (4<sup>th</sup> Ed 1998 Reissue) paras 884-885.

For cases on appointment of arbitrators, see 1 *Mallal's Digest* (4<sup>th</sup> Ed 1998 Reissue) paras 892-896.

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### Cases referred to

*Emile Erlanger & Ors v New Sombrero Phosphate Co & Ors* (1878) App Cas 1218

*Fullwood v Fullwood* (1879) 9 Ch D 176

*Tracom SA v Anton C Nielsen A/S* [1984] 2 Lloyd's Rep 195

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### Legislation referred to

Arbitration Act 1952 ss 6, 12, (a), 30

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**Appeal from:** Saman Pemula No R2-24-22-1997 (High Court, Kuala Lumpur).

*Dato' RR Sethu (RR Sethu)* for the respondent/appellant.

*GK Ganesan (Ainin Aniyah Mustapha with him) (GK Ganesan, Saiful & Rokiah)* for the applicant/respondent

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**Mohd Noor Ahmad JCA** (delivering judgment of the court):

By an originating summons, the applicant sought for one Mr GE Kemshall or someone else to be appointed as the arbitrator to settle the disputes between the applicant and the respondent. The learned judge appointed one Mr Khoo Eng Chin as the arbitrator. Hence, this appeal by the respondent. We dismissed the appeal with costs and ordered the deposit to be paid towards taxed cost. Now, we give our reasons.

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2 Under an agreement of 1 December 1988, the applicant contracted to upgrade the then existing Rolling Mill of the respondent on the site. Subsequently, disputes arose between the parties relating firstly, to an

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- A** alleged repudiatory breach of the agreement when the respondent refused to allow access to the applicant's servants into the site on 20 May 1991 and secondly, to the discovery by the applicant sometime in May 1991 that the machinery and equipment on the site were incomplete, being contrary to the agreement, and to the fact that the respondent prevented the applicant from making a list of the available equipment on the site. The agreement
- B** provides for arbitration of disputes by an arbitrator. One Mr GE Kemshall was named as 'the arbitrator we now suggest'. On 13 June 1991, the applicant through its solicitors wrote to the respondent informing that the former was agreeable to the determination of the agreement, subject to certain terms and conditions to be agreed upon and if the latter did not agree, the matter would be referred to arbitration. On 26 June 1991, the
- C** respondent wrote to the applicant's solicitors intimating that its claim might have to go to arbitration in the face of the denial by the applicant of the breach of contract and at the same time requesting for the applicant's proposal for an amicable settlement, on a without prejudice basis. On 13 July 1991, the applicant's solicitors wrote to the respondent submitting the
- D** outstanding sums claimed by the applicant from the respondent and intimating that if the respondent did not agree to the claim the applicant would proceed to appoint the arbitrator as designated. The attempt for an amicable settlement failed. On 7 March 1993, the applicant's solicitors wrote to the respondent informing that Mr GE Kemshall had indicated his willingness to arbitrate on the matter. On 22 April 1993, the respondent's
- E** solicitors wrote to the applicant's solicitors intimating that the respondent had no objection to refer the disputes to arbitration, but objected to the appointment of Mr GE Kemshall as the arbitrator, instead requested the applicant to furnish the name of another arbitrator for the respondent's consideration. Nothing came out from this. On 19 February 1997, the
- F** applicant's solicitors, by letter, notified the respondent that the applicant wished to refer the disputes to arbitration in the terms of the agreement. However, by letter of 3 March 1997 to the applicant's solicitors, the respondent replied alleging, inter alia, the abandonment of recourse to arbitration on the part of the applicant. The applicant filed the impugned application on 9 April 1997.
- G** 3 We gather from the notes of proceeding that the application was neither argued before the court nor its merits considered by the learned judge and that the arbitrator appointed by the learned judge was from the list of names proposed by the respondent. Be that as it may, we proceeded to consider the merits of the application based on the submission and reply of both the learned counsel.
- H** 4 Before us, the learned counsel for the respondent raised three issues, viz:
- (a) is s 12 of the Arbitration Act 1952 ('the Act') applicable?
- (b) was there any abandonment of the arbitration contract by the
- I** applicant?
- (c) does the delay on the part of the applicant deny the applicant relief under s 12?

5(1) On issue (a), the learned counsel submitted that s 12 does not apply where there is specific arbitrator named in the agreement because sub-s (a) of the section applies only if the parties fail to agree to the appointment of an arbitrator. None of the events contemplated under the section arose in the case since the applicant did not seek the removal of Mr GE Kemshall and for a substitution; and the court cannot unilaterally, and its own, remove a named arbitrator without an application for that purpose.

(2) Section 12 of the Act empowers the High Court, in certain cases, to appoint an arbitrator. Under para (a) of the section, where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator, any party may serve the other party with a written notice to appoint or to concur in appointing an arbitrator and if the appointment is not made within 21 clear days after the service of the notice, the High Court may, on the application by the party who gave the notice, appoint an arbitrator. And under para (b) of the section, by the same procedure, the High Court may appoint an arbitrator to replace the arbitrator appointed by the parties if the arbitrator refuses to act, is incapable of acting or dies. Further, s 24 of the Act empowers the High Court to remove an arbitrator who has misconducted himself or the proceedings. On the facts of this case, in our view, the applicant's application had been properly made to the High Court. Firstly, although under the agreement Mr GE Kemshall was the arbitrator 'suggested' by both parties, the respondent objected to his appointment as the arbitrator after the disputes had arisen. Hence, the position thereafter was that there was no agreement between all the parties as to the appointment of an arbitrator. Secondly, the applicant's application is for the appointment of the designated arbitrator or his substitute. It could not be made solely for the replacement of the designated arbitrator because he had already indicated his willingness to arbitrate on the matter. And also, it was still premature to apply for the removal of the designated arbitrator because he had not misconducted himself or the proceedings. And lastly, the applicant had given the required notice to the respondent and no appointment of an arbitrator had been made by the parties after the lapse of the 21 clear days. Therefore, the answer to this issue is in the positive.

6(1) With regard to issue (b), the learned counsel submitted that the applicant had abandoned the agreement to arbitrate by its silence and inactivity for some years between the time the disputes first arose (June 1991) and the application to the court (9 April 1997). He cited the case of *Tracom SA v Anton C Nielsen A/S* [1984] 2 Lloyd's Rep 195 in support thereof. In that case, a delay of 5 1/2 years after the appointment of the arbitrator was held to be an abandonment. He asserted that the ordinary principle applicable to contracts applies to the present case.

(2) With due respect, we find no merits in the submission. From the correspondence between the parties we are satisfied that there was no silence or inactivity at all on the part of the applicant on the contract to arbitrate. In the midst of the proposed amicable settlement, the Applicant had been quite loud and active on its intention to arbitrate on the disputes but the arbitration machinery could not get off the ground because of some

- A** hurdles placed before it by the respondent. The *Tracom* case can be distinguished. There, the defendant did nothing for five and a half years after the appointment of its arbitrator, the defendant had pursued a parallel action on the same dispute in another jurisdiction and the plaintiff had acted diligently to store the relevant documents for more than ten years which were destroyed by the passage of time; and whereas here, there are
- B** no parallel circumstances. Therefore, the answer to this issue must be in the negative.

- C** 7(1) In respect of issue (c), the learned counsel submitted that s 12 of the Act confers a discretion on the court or judge. The learned judge ought not to have exercised the discretion to appoint an arbitrator by reason of the delay. Although the applicant explained the delay by reason that it was engaged in other (unrelated) litigation and had placed the matter in the hands of its solicitors, it was wholly insufficient.

- D** (2) In our view, in considering the reason for the delay as advanced by the applicant we must also have regard to two other factors as revealed by the facts. The first factor is the existence of the attempt for an amicable settlement which subsequently failed. The second is the attitude or conduct of the respondent on the matter relating to the appointment of an arbitrator. Certainly, these two factors had contributed to the delay. Be that as it may, to our mind, the more pertinent question to consider is whether (at the worst if we are to take that the delay is inordinate and unexplained) such
- E** delay is fatal, having regard to the provisions of ss 6 and 30 of the Limitation Act 1953. Under s 6(1)(a), the period of limitation for an action founded on a contract is six years from the date on which the cause of action accrued. Similarly, s 30 confers a six-year limitation for disputes in contracts to be referred to arbitration. On the facts, the applicant's cause of action against the respondent is for the alleged repudiatory breach of the agreement. The
- F** cause of action accrued on or about 20 May 1991. The six-year limitation period would creep in only on or after 20 May 1997. The same can be said on the need to refer the disputes arising out of the agreement to arbitration. As the applicant filed the application on 9 April 1997 it was well within time as stipulated in the aforesaid sections for both the action founded on
- G** contract and the reference of the disputes in contract to arbitration. As long as the applicant was entitled to commence its action founded on contract, it was also entitled to trigger the mechanism of the arbitration clause as stipulated in the agreement. Mere lapse of time will not be a bar to the granting of relief including an equitable relief, unless it would be a bar to the legal right (*Fullwood v Fullwood* (1879) 9 Ch D 176). And, if the relief is not
- H** barred by limitation, the delay is argued against relief being granted based on equitable principles; in which case the court will have to consider the length of the delay and the conduct of the party responsible for the delay whether such conduct may be fairly regarded as equivalent to a waiver or whether such conduct and neglect have prejudiced the other party (*Emile Erlanger & Ors v New Sombrero Phosphate Co & Ors* (1878) App Cas 1218).
- I** However, we are of the view that the facts of this case do not merit our consideration on those factors for the aforesaid reasons. Therefore, the answer to this issue is in the negative.

*Appeal dismissed with costs.*

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Reported by Andrew Christopher Simon

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